

	<a href="#">Link to Final Agency Decision</a>
	OAH Docket No. 54-2000-17028-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
  
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Restoration Order Issued to Thomas M. Stanek	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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This matter was heard on May 1, 2006 in Minneapolis, Minnesota before Administrative Law Judge Lucinda E. Jesson. The record in this matter closed with the receipt of the final post-hearing brief on June 7, 2006.

Appearing on behalf of the Department of Natural Resources (the Department) was Assistant Attorney General Jill Schlick, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127.

Appearing on behalf of Thomas M. Stanek was William Peterson, 3601 Minnesota Drive, Suite 800, Bloomington, Minnesota 55435.

### NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Natural Resources (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Gene Merriam, Commissioner, MN Department of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155, to find out how to file exceptions or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under

Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **STATEMENT OF THE ISSUES**

1. Is the walkway constructed by Thomas Stanek a bridge providing private access to an island in violation of Minnesota Rule 6115.0230, subpart 3(F)?

2. If so, is the bridge reasonable, practical and constructed in a manner that will adequately protect the public safety and promote the public welfare, entitling Thomas Stanek to an after-the-fact permit for its construction?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

1. Thomas M. Stanek (Stanek) owns lakeshore property on Gale Lake in Itasca County, Minnesota. His property is legally described as the East 240 feet of the NW ¼ of the SE 1/4 ; the East 240 feet of Government Lot 1; the West 320 feet of Government Lot 2; and the West 320 feet of Government Lot 3, and including one acre more or less island adjacent to Government Lot 1, all in Section 15, Township 60 North, Range 25 West, Itasca County, Minnesota. Stanek purchased the property in April 1995.

2. Since purchasing the property, Stanek built a cabin on it which his family uses two or three weekends a month. His father, who has limited walking ability, stays at the cabin more frequently. The Stanek family enjoys fishing and swimming off a pontoon boat Stanek owns. Stanek's lakeside property also includes a dock.<sup>1</sup>

3. Part of Stanek's Gale Lake property is a landform (the disputed landform) which is connected to his lakeside property at times and separated at other times, when water levels are higher. The deed to the property described this landform as an island.<sup>2</sup> The disputed landform was an island the year of

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<sup>1</sup> Testimony of Thomas Stanek.

<sup>2</sup> Stanek testimony.

purchase, 1995.<sup>3</sup> On cross examination, Stanek further stated that he had never walked from the lakeshore of property to the disputed landform in tennis shoes.

4. Aerial photographs of the lake from 1939 to the present demonstrate that at times the disputed landform appears to be a peninsula, connected by land to the lakeshore while at other times the subject landform appears as an island, separated from the lakeshore by water.<sup>4</sup>

5. Limnologist Richard Osgood, expert witness for Stanek, testified that the disputed landform is “peninsula like” in most years. Osgood, based primarily upon his review of aerial photographs, described the disputed landform as a peninsula in 1939, 1940, 1947, 1958, 1966, 1975, 1989 and 2003. It was possibly an island in 1982 and 1991 and more clearly an island in 1995 and 2005, according to Osgood.<sup>5</sup> He qualified his opinion with regard to the 1966 photograph by noting that there appeared to be a “channel” between the disputed landform and the rest of the Stanek property.

6. A 1940 DNR depth sounding map of Gale Lake, which appeared on the DNR website in 2005, illustrates the shoreline of the lake to show the disputed landform as a peninsula.<sup>6</sup> This is consistent with the landform as viewed in the aerial photographs from 1939 and 1947. Aerial photographs from other years, however, are less clear<sup>7</sup> and aerial photographs from 1991, 1995, and 2005 show the disputed landform as an island.<sup>8</sup>

7. When viewing aerial photographs, it is sometimes difficult to distinguish between dry land and water in which aquatic vegetation is growing. This limits the usefulness of aerial photographs in determining whether there was water between Stanek’s lakeshore property and the disputed landform.<sup>9</sup>

8. The ordinary high water level is the jurisdictional boundary of public waters in Minnesota. It is defined as an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominately aquatic to predominately terrestrial.<sup>10</sup>

9. The ordinary high water level of Gale Lake is 1378.0 feet above sea level.<sup>11</sup> That elevation is the boundary of the lake.<sup>12</sup> The elevation of the land

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<sup>3</sup> Post hearing brief of Thomas Stanek at p. 5.

<sup>4</sup> Ex. 11A, 50-60.

<sup>5</sup> Testimony of Richard Osgood and Exhibits 50-60, 64A, and 64B

<sup>6</sup> Ex. 65 and Ex. 71.

<sup>7</sup> Ex. 52 (1958) and Ex. 53 (1966).

<sup>8</sup> Ex. 57, Ex. 11, and Ex. 7, 8 and 9.

<sup>9</sup> Testimony of Howard Christman.

<sup>10</sup> Minn. Stat. 103G.005, subd. 14.

<sup>11</sup> Stipulation of the parties and Ex. 22.

<sup>12</sup> Christman testimony.

below the walkway is lower than the ordinary high water level.<sup>13</sup> DNR Survey Technician Kurt Woodrich testified that on Oct. 25, 2005, lakebed beneath the walkway was between two and three feet lower than the ordinary high water level throughout at least a fifty foot area.<sup>14</sup> This testimony was undisputed at the hearing.

10. DNR Area Hydrologist Howard Christman defined an island to be an area of land located at an elevation above the ordinary high water level of water which is circumscribed by the ordinary high water level of the public water.<sup>15</sup> The disputed landform is above the ordinary high water level of Gale Lake and the waters around the disputed landform (including the lakebed below the walkway) are at or lower than the ordinary high water level.<sup>16</sup>

11. The disputed landform is an island.

12. In the winter of 2004-2005, Stanek constructed a 120-foot long by 5-foot wide walkway connecting his lakeshore property on Gale Lake with the island.<sup>17</sup> He constructed the walkway for the use of his family, particularly so that his father (who is disabled) would have access to that part of the property with a small ATV.<sup>18</sup> Without the walkway structure, Stanek's family had to take a boat from his dock to fish at the southern point of the island. Stanek discussed the walkway with his neighbors prior to building it and received no negative feedback.<sup>19</sup> The walkway is made of treated lumber. It is held up by eight vertical steel posts, grouped in four pairs of two.<sup>20</sup> The vertical supports are similar to supports for a dock.<sup>21</sup>

13. Stanek stated that there is water below the walkway "sometimes" and that there are lily pads in the area. Where there is ground, it is "spongy and wet".<sup>22</sup> The water in the area which is now below the walkway is not navigable for speedboats, but (if there was no walkway in place) it could be navigated by canoe or kayak.<sup>23</sup>

14. In June 2005, DNR Area Hydrologist Howard Christman (Christman) received a complaint regarding the construction of the bridge on the Stanek property. Christman determined that no permit had been obtained to

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<sup>13</sup> Testimony of Kurt Woodrich; Ex. 22.

<sup>14</sup> Woodrich testimony.

<sup>15</sup> Christman testimony.

<sup>16</sup> Testimony of Woodrich and Ex. 22.

<sup>17</sup> Stanek testimony; Ex. 3.

<sup>18</sup> Stanek testimony.

<sup>19</sup> Ex. 3.

<sup>20</sup> Stanek testimony.

<sup>21</sup> Stanek, Osgood testimony.

<sup>22</sup> Stanek testimony.

<sup>23</sup> Testimony of Stanek, Osgood.

build a bridge on Gale Lake and went to the property to inspect the site. There was water under the walkway on the day of his visit, June 23, 2005.<sup>24</sup>

15. DNR waters survey crew also inspected the subject property on October 25, 2005. At that time the island was separated from the lakeshore by water which was nearly three feet deep under the center of the walkway.<sup>25</sup>

16. The walkway provides a crossing of public waters. Although it can be raised or lower, at its present height it obstructs navigation by canoe and kayak. The walkway is a bridge for purposes of Minn. Rule 6115.0230.

17. Christman prepared a Restoration Order which was issued to Stanek on July 13, 2005 (the Restoration Order). The Order stated that the bridge is prohibited by Minnesota Rule 6115.0230, subpart 3(F) because it provides private access to an island. The Restoration Order directed Stanek to perform restoration by "removing all components of the bridge in their entirety and replacing the bridge materials in a suitable upland location outside of public waters."<sup>26</sup> Finally, the Restoration Order further noted that the property was the site of a previous public waters permit violation conducted by Stanek in 2000 and that one condition of the previous order was that Mr. Stanek refrain from any future violations relating to public waters of the state of Minnesota.<sup>27</sup>

18. Stanek requested review of the Restoration Order pursuant to Minnesota Rule 6115.0255, subpart 5(A) (2005), but the Department upheld the Restoration Order.<sup>28</sup>

19. At the hearing on May 1, 2006 Stanek served the Department with a petition for a variance pursuant to Minnesota Statutes section 14.055 (2004).<sup>29</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. Stanek properly appealed the Restoration Order. The Commissioner gave proper notice of the hearing and has fulfilled all relevant procedural requirements of law or rule. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter.

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<sup>24</sup> Christman testimony and Exs. 7-9.

<sup>25</sup> Ex. 22, p. 6

<sup>26</sup> Ex. 2.

<sup>27</sup> Ex. 2.

<sup>28</sup> Ex. 3-4.

<sup>29</sup> The ALJ granted the Department's motion in limine and excluded the evidence regarding the variance petition with the exception that the ALJ permitted Stanek to testify that he had submitted a petition for a variance and admitted a copy of the petition into evidence.

2. Stanek has the burden of establishing by a preponderance of the evidence that the walkway he constructed is not a bridge providing private access to an island in violation of Minnesota Rule 6115.0230, subpart 3(F).

3. Stanek has the burden of establishing by a preponderance of the evidence that, if the walkway is a bridge providing private access to an island, that it is reasonable, practical and constructed in a manner that will adequately protect the public safety and promote the public welfare, entitling Stanek to an after-the-fact permit for its construction.

4. Stanek's property on Gale Lake includes an island.

5. In the winter of 2004-2005, Stanek constructed a wooden walkway from his lakeshore property to the island. That walkway is a bridge which provides private access for Stanek's family to an island.

6. The bridge crosses public water and obstructs navigation.

7. Stanek failed to obtain a permit prior to constructing the bridge. It was constructed in violation of Minnesota Rule 6115.0230 subpart 3. Stanek has failed to prove by a preponderance of the evidence that the walkway he constructed is not a bridge providing private access to an island.

8. Stanek's family could access the island by boat, from their existing dock, as they did prior to the construction of the bridge.

9. Stanek has not met his burden of proving that the building of the bridge is the minimum encroachment upon the environment and that there is no feasible alternative to its building.<sup>30</sup>

10. Stanek has failed to prove by a preponderance of the evidence that his bridge is reasonable, practical and constructed in a manner that will adequately protect the public safety and promote the public welfare.

11. The foregoing Conclusions of Law are based on the reasons set out in the Memorandum which follows and which is incorporated into these conclusions by reference.

Based on these Conclusions, and the reasons set out in the attached Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge recommends that the Restoration Order be upheld.

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<sup>30</sup> Minn. Rule 6115.0230, subpart 5(A) (2004).

Dated: July 14, 2006

s/Lucinda Jesson

Administrative Law Judge

Reported:   Taped, 2 tape(s)  
              No transcript prepared

## MEMORANDUM

The two major factual disputes at the heart of this hearing are whether the walkway constructed by Stanek is, indeed, a bridge and, if so, whether it provides a crossing of public waters to an island. Neither the term “island” nor the term “bridge” are defined by the public waters regulations.

While much of the testimony at the hearing examined photos and rainfall totals from decades past, the question of whether the landform is an island is best answered by examining the past ten years, when Stanek owned the property, rather than depression era maps. The landform was described in the deed as an island when Stanek purchased it. He has never walked in tennis shoes from his cabin to the landform (which his expert describes as a peninsula). He describes the land between the two parts of his property as “spongy” and sometimes covered by water—to the point it is filled with lily pads and navigable by canoe. The photographs since 1995 almost all show water surrounding the island. The photographs taken by the Department in its investigation in 2005 clearly show a significant amount of water under the walkway Stanek built. Finally, the lakebed below the walkway was undisputedly below the ordinary high water level of Gale Lake.

Having found that there is navigable water below the walkway, it is clear that the walkway itself is a “crossing” of public waters. The dictionary definition of a “bridge” is “a structure spanning and permitting passage over a river, chasm, road or the like.”<sup>31</sup> Minnesota Rule 6115.0230, subpart 3(F) (2004) states that ‘crossings are prohibited when the project . . . will provide private access to an island.’ The rule governs “any bridge, culvert, intake, outfall, or other crossing of public waters.”<sup>32</sup> Christman testified that, upon inspection after receiving the complaint, he considered the structure to be a bridge rather than a dock. He based this opinion on the fact that it was used for access to an island, rather than to moor boats. Stanek admits that he constructed the walkway to do just that: provide passage to a part of his property which, prior to the construction, was accessible only by boat.

Given the fact that the walkway directly violates the prohibition on private crossings to islands, it is difficult for Stanek to meet his burden of proving that he is entitled to an after-the-fact permit. Moreover, Minnesota Rule 6115.0230, subpart 5 (E) only permits crossings of public waters when there is no feasible or practical alternative that does not require the placement of a structure in public waters. As the Department argues, Stanek does have an alternative: he can access the island by boat. This argument is made more difficult by the fact that

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<sup>31</sup> Random House College Dictionary 168 (1988).

<sup>32</sup> Minn. R. 6115.0230, subp. 2 (2004).



Stanek's father, who frequents the property, is disabled. It is less feasible to expect Stanek's father (as opposed to Stanek) to have reasonable access to the island via boat. This is particularly true when he is alone at the property. However, given the clear imperative of the prohibition on private crossings and the fact that Stanek has the burden of proving that he meets the requirements for an after-the-fact permit, his appeal falls short.<sup>33</sup> Stanek's arguments regarding access for his father are best considered by the Commissioner in his petitioner for a variance, which is outside the scope of this current proceeding.

**L.E.J.**

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<sup>33</sup> In his post hearing brief, Stanek also argues that the enactment and enforcement of the prohibition on private access crossings contained in Minn. Rule 6115.0230 subp. 3(F) constitutes an unconstitutional violation of the separation of powers. Stanek post-hearing brief at pages 1-4. That argument, which was not addressed in the hearing itself, must be brought in another forum. In the Matter of Rochester Ambulance Service, Inc. 500 N.W. 2d 495, 499-500 (Minn. App. 1993)(An ALJ lacks the authority to declare a statute unconstitutional).